93-710

Supreme Court, U.S.
FILED
OCT 27 1993
OFFICE OF THE CLERK

No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FRANK TALLEY,
Petitioner,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE,
Howard L. Fryett, Dennis P. Adams, Lowell Jaeger,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

E. EUGENE ATHERTON
E. EUGENE ATHERTON, P.C.
735 Main Street
Kalispell, Montana 59901
(406) 752-8555

Attorney for Petitioner

Trippet's Printing - Kalispell, Montana

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Montana Supreme Court, by failing to give Petitioner an opportunity to establish his "property interest" in his employment, violated the property and liberty interests established by this Court in Perry v. Sindermann, 408 US 593, 33 L.Ed.2d. 570, 92 S.Ct. 2694 (1972), and Board of Regents v. Roth, 408 US 564, 33 L.Ed.2d. 548, 92 S.Ct. 2701 (1972).

2. Whether the Montana Supreme Court, by failing to reverse the trial court's grant of summary judgment, violated summary judgment rules established by this court in Anderson v. Liberty Lobby, Inc., 477 US 242, 91 L.Ed.2d. 202, 106 S.Ct. 2505 (1986) and by the Ninth Circuit Court of Appeals in Peacock v. Duval, 695 F.2d. 644 (1982).

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTE PROVISIONS INVOLVED	3
STATEMENT OF GROUNDS.	4
STATEMENT OF THE CASE	5
ARGUMENT	10
I. THE MONTANA SUPREME COURT, BY FAILING TO GIVE TALLEY AN OPPORTUNITY TO ESTABLISH HIS "PROPERTY" INTERESTS IN HIS EMPLOYMENT, VIOLATED THE PROPERTY AND LIBERTY INTERESTS ESTABLISHED BY THIS COURT IN PERRY V. SINDERMANN, 408 US 593, 33 L.Ed. 2d. 570, 92 S.Ct. 2694 (1972)	

TABLE OF CONTENTS; Continued

Page

AND BOARD OF REGENTS V. ROTH, 408 US 564, 33 L.Ed.2d. 548, 92 S.Ct. 2701.

II. THE MONTANA SUPREME COURT, BY FAILING TO REVERSE THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT, VIOLATED SUMMARY JUDGMENT RULES ESTABLISHED BY THIS COURT IN ANDERSON V. LIBERTY LOBBY, INC., 477 US 242, 91 L.Ed.2d. 202, 106 S.Ct. 2505 (1986) AND BY THE NINTH CIRCUIT COURT OF APPEALS IN PEACOCK V. DUVAL, 695 F.2d. 644 (1982).

CONCLUSION 20

CERTIFICATE OF MAILING 23

TABLE OF AUTHORITIES

Cases: **Page**

Anderson v. Liberty Lobby, Inc., 477 US 242, 91 L.Ed.2d. 202, 106 S.Ct. 2505 (1986) 18

Board of Regents v. Roth, 408 US 64, 33 L.Ed.2d. 548, 92 S.Ct. 2701 11

Mt. Healthy City School District Board of Education v. Doyle, 429 us 274, 50 L.Ed.2d. 471, 97 S.Ct. 563 (1977). 16

Peacock v. Duval, 695 F.2d. 644 (1982). 19

Perry v. Sindermann, 408 US 593, 92 S.Ct. 2694, 34 L.Ed.2d 570 (1972) 9, 11, 13

Vail v. Board of Education of Paris Union School District No. 95, 706 F.2d. 1435 (1983) . . . 16

TABLE OF APPENDICES

APPENDIX

A. Opinion of the Supreme Court of the State of Montana in Talley v. Flathead Valley Community College, et al., #92-505, decided July 29, 1993

B. Memorandum and Order, Talley v. Flathead Valley Community College, et al., #DV-89-526(B) (Mont. Dist. Ct., 11th Dist.)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-

FRANK TALLEY,

Petitioner,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 1, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; LOWELL JAEGER, Individually and as the Chairman of the Division of Humanities of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

OPINION BELOW

The opinion of the Supreme Court of Montana, dated July 29, 1993 is reported at 857 P.2d 701 and is reproduced as Appendix A to this Petition.

JURISDICTION

The decision and order of the Montana Supreme Court was entered July 29, 1993, affirming the judgment of the trial court entered September 21, 1992, which judgment granted Respondents' Motion for Summary Judgment. The jurisdiction of this Court is invoked under 28 U.S.C Section 1257.

CONSTITUTIONAL AND STATUTE PROVISIONS INVOLVED

This case involves portions of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, as well as 42 USC Section 1983, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech or . . . to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> No person shall be . . . deprived of life, liberty, or property without due process of law . . . .

U.S. Const. amend. V.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, Section 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

42 USC, Section 1983.

STATEMENT OF GROUNDS

1. In its decision dated July 29, 1993, the Montana Supreme Court has decided an important question of federal law in a way that conflicts with applicable decisions of this Court.

2. By its decision dated July 29, 1993, the Montana Supreme Court has decided a federal question in a way that conflicts with decisions of the United States Court of Appeals.

STATEMENT OF THE CASE

The names of all parties to this case appear in the caption of the case.

Petitioner (Talley) was a part-time instructor at the Respondent college (FVCC), having taught various philosophy courses from the fall quarter of 1982 through the winter quarter of 1989 on quarter by quarter written contracts. There was never any question concerning Talley's competency to teach and his classes consistently met curriculum

requirements.

Although he was under a written contract to teach, Talley's classes were cut from the curriculum for the winter quarter of 1989 and only reinstated after he appealed the decision to cut to the department head, the Dean of Educational Services (Respondent Adams) and, finally, to the college president (Respondent Fryett). Without apparent reason, Talley's classes were again cut for the spring quarter of 1989 and he was not offered a contract to teach. Talley again appealed the decision to cut to the department head, Dean of Educational Services and, finally, the college president. The president told Talley that his classes would be reinstated

if he obtained the signatures of twelve students willing to take the classes. Although the requisite signatures were obtained, the classes remained cut. However, the college president assured Talley that his classes would be reinstated for the summer and fall quarters of 1989.

Believing that his classes were cut contrary to the curriculum requirements established by the FVCC Board of Trustees, Talley requested a hearing on this subject in front of the Board of Trustees but was refused.

Talley next sought counsel who advised that Talley had a reasonable expectation (property interest) for the opportunity to seek continued employment at FVCC and so

advised FVCC in writing. On March 9, 1989, counsel for FVCC wrote back demanding that Talley "disavow" his legal rights. He wrote that:

> ". . . I must request that your client disavow his 'expectations of continuing employment' and acknowledge the college's discretion to determine whether to offer him part-time employment on a quarter by quarter basis. In absence of such a disavowal and acknowledgment, I must advise the college, as stated above, not to employ Mr. Talley for the summer quarter and to employ him very sparingly thereafter. "

Talley, morally outraged and shocked by the demand that he "disavow" his legal rights, filed suit against FVCC alleging a number of theories including the First, Fifth, and Fourteenth amendments to the United States Constitution and 42 USC, Section 1983.

FVCC filed a Motion for Summary Judgment on all of Talley's claims and Talley filed a Cross-Motion for Summary Judgment on some of his claims. On September 21, 1992, the State trial Court denied Talley's Motion for Summary Judgment and granted FVCC's Motion as it related to numerous of Talley's claims, including his claims based upon the First, Fifth, and Fourteenth Amendments to the United States Constitution and his 1983 claim.

The case was then appealed to the Montana Supreme Court and argued on briefs. On appeal, Talley argued, among other points, that he had acquired a property interest in his employment under the authority of Perry v. Sindermann, 408 US 593, 92 S.Ct. 2694,

34 L.Ed.2d 570 (1972) irrespective of the fact that he taught on quarter by quarter contracts. The Montana Supreme Court, citing its own case of Farris v. Hutchinson, 254 Mont. 334, 838 P.2d. 374 (1992), clearly ignored the Sindermann property interest question and affirmed the State Trial Court's grant of summary judgment on the federal question.

ARGUMENT

I. THE MONTANA SUPREME COURT, BY FAILING TO GIVE TALLEY AN OPPORTUNITY TO ESTABLISH HIS "PROPERTY" INTERESTS IN HIS EMPLOYMENT, VIOLATED THE PROPERTY AND LIBERTY INTERESTS ESTABLISHED BY THIS COURT IN PERRY V. SINDERMANN, 408

US 593, 33 L.Ed. 2d. 570, 92 S.Ct. 2694 (1972); BOARD OF REGENTS V. ROTH, 408 US 564, 33 L.Ed. 2d. 548, 92 S.Ct. 2701.

In Sindermann, and its companion case, Roth, this Court clearly pointed out that an employee can acquire "property" interests in his employment which interests subject to procedural due process protection are "not limited by a few riged, technical forms". 33 L.Ed.2d. at 580.

In this case, the Montana Supreme Court properly determined that Talley was an instructor at FVCC who had for six and a half years taught under successive written quarterly contracts, the later of which contained the following phrase:

> It is understood and agreed that acceptance of this contract confers no right on the part-time faculty member to tenure, credit toward tenure, or <u>any other permanent faculty status</u>. (Emphasis added) (857 P.2d. at 705).

However, although the Montana Supreme Court properly found that "no obligation can be implied which would result in the obliteration of a right expressly given under a written contract" (857 P.2d. at 706 and App. A., p.27), it improperly determined that "Talley has no property interest in his position because his contract clearly prohibits it; therefore, due process under the Montana or United States Constitution is not at issue." (857 P.2d. at 707 and App. A., p.30).

Although each of Talley's teaching

contracts clearly state that they "confer no . . . permanent faculty status", they do not, nevertheless, indicate that an instructor could not acquire a "property interest" in his employment so as to allow for due process protections. In Sindermann, the Respondent, Robert Sindermann, taught under a series of one year contracts. He had no guarantee of "permanent faculty status". Nevertheless, this Court found that Sindermann's "property" interests were not "limited by a few rigid, technical forms" (33 L.Ed.2d. 580) but were, instead, secured by existing "rules or mutually explicit understandings that support his claim of entitlement to the benefit and that may be invoked at a

hearing". (33 L.Ed.2d. 580).

Talley demonstrated numerous "understandings" by showing, among other factors:

A. That he was required to construct his classes for one year in advance irrespective of the fact that he taught only on quarter by quarter contracts.

B. That grants of money for innovative projects were offered to part-time instructors for use in future teaching quarters.

C. That Ed Meyers, a prior college president, had told Talley that he could expect to continue teaching in the future as long as there existed sufficient funding and adequate enrollment for his

classes.

D. That, irrespective of the wording of the quarterly contracts, instructors had been allowed to teach for years.

E. That the college's Board Policy No. 930 set out a grievance procedure, something that was denied to Talley.

F. That it was the college's past practice that curriculum changes would go through the curriculum committee whereby, in this case, Talley's classes were stricken from the curriculum and class schedule on order of the college president.

Nevertheless, the Montana Supreme Court chose to sweep all of these "understandings" away by ruling that the

wording of "Talley's contract specifically precludes any property rights" (857 P.2d. at 706). The property right cannot be denied by the wording of the employment contract. It is created by the employment circumstances. And, once that property right was created, it was entitled to due process protection and Talley was entitled to the hearing that he had requested. Mt. Healthy City School District Board of Education v. Doyle, 429 US 274, 50 L.Ed.2d. 471, 97 S.Ct. 563 (1977); Vail v. Board of Education of Paris Union School District No. 95, 706 F.2d. 1435 (1983), Affirmed, 466 US, 377, 80 L.Ed.2d. 377.

II. THE MONTANA SUPREME COURT, BY FAILING TO REVERSE THE TRIAL COURT'S GRANT OF

SUMMARY JUDGMENT, VIOLATED SUMMARY JUDGMENT RULES ESTABLISHED BY THIS COURT IN ANDERSON V. LIBERTY LOBBY, INC., 477 US 242, 91 L.Ed.2d. 202, 106 S.Ct. 2505 (1986) AND ESTABLISHED BY THE NINTH CIRCUIT COURT OF APPEALS IN PEACOCK V. DUVAL, 695 F.2d. 644 (1982).

In its decision, the Montana Supreme Court recognized that Talley had contended that he had not been rehired "because he had spoken out concerning policies of the college" (857 P.2d. at 702 and Appendix A, pages 4 and 5). Nevertheless, with this contention in mind, the Montana Supreme Court affirmed the trial court's grant of summary judgment showing that it too, like

the trial court, disbelieved not only Talley's contention regarding free speech but also the various contentions outlined on pages 14 and 15 above.

In Anderson v. Liberty Lobby, Inc., 477 US 242, 91 L.Ed.2d. 202, 106 S.Ct. 2505, this Court determined that in cases involving the exercise of constitutionally protected freedoms, the grant of summary judgment simply was insufficient to adequately protect those freedoms. It found that, in the case of a motion for summary judgment "the evidence of the non-movant is to be believed and all justifiable inferances are to be drawn in his favor". Liberty Lobby, Inc., 91 L.Ed.2d. at 216. When Talley contended

that he had not been rehired because he had spoken out concerning policies at the college, neither the trial court nor the Montana Supreme Court believed him. Furthermore, the trial court, by granting summary judgment and the Montana Supreme Court, by affirming, caused the door to Talley's opportunity to prove his contention regarding constitutionally protected freedoms to be slammed shut.

In Peacock v. Duval, 695 F.2d. 644, the Ninth Circuit Court of Appeals, in reversing the trial court's award of summary judgment adverse to a college professor held that:

> "Merely because Peacock's speech may have had the effect of irritating or even harrassing the University's Administration does

> not mean that such speech is stripped of its First Amendment Protection . . . . It will always be possible for employers to advance after the fact rationalizations for dismissals in response to the exercise of Constitutional Rights. Summary Judgment in cases such as this would mean that many instances of retaliatory firings might never reach the jury. Only a full trial can separate permissible motivations from those that merely hide unconstitutional behavior." (695 F.2d. at 647 and 648).

Thus, to deny Talley a full trial denies him, likewise, the opportunity to establish the unconstitutional behavior of FVCC. The breach of constitutional freedoms simply cannot be summarily determined and the grant of summary judgment by the trial court and its subsequent affirmation from the Montana Supreme Court was wrong.

CONCLUSION

In ruling that the language of Talley's employment contract excludes the development of a property interest, the Montana Supreme Court has not only ignored this Court's rulings in Sindermann and Roth, but has also dealt a devastating blow to Montana workers. Under the ruling, an employer could make significant representations relative to the possibility of continued employment and allow the development of other "understandings" and yet deny due process when the employment relationship is terminated.

In failing to reverse the trial court's grant of summary judgment, the Montana Supreme Court has ignored this Court's

rules concerning summary judgment in cases involving the constitionally protected freedoms as established in Liberty Lobby, Inc., and as established by the Ninth Circuit Court of Appeals in Peacock.

Petitioner respectfully urges this Court to act immediately to reverse this erroneous attitude taken by the Montana Supreme Court by granting certiorari to conduct its own review of the record below.

Respectfully submitted this 26TH day of October, 1993.

E. EUGENE ATHERTON, P.C.

E. Eugene Atherton

E. Eugene Atherton
E. EUGENE ATHERTON, P.C.
735 Main Street
Kalispell, Montana 59901
(406) 752-8555

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Brenda Hamblin, secretary to E. Eugene Atherton, do hereby certify that on this 27th day of October, 1993, I forwarded a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA, by first class mail, postage prepaid, upon:

Jonathan Smith
Flathead County Attorney
Flathead County Courthouse
800 South Main
Kalispell, Montana 59901

Attorney for Respondents

Clerk of Montana Supreme Court
215 North Sanders, Rm. 323
Helena, Montana 59620-3003

Honorable Michael H. Keedy
Flathead County Courthouse
800 South Main
Kalispell, Montana

Brenda Hamblin

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1993

No. 92-505

FRANK TALLEY,

Plaintiff and Appellant,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 1, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; LOWELL JAEGER, Individually and as the Chairman of the Division of Humanities of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Defendants and Respondents.

Appeal From: District Court of the Eleventh Judicial District, In and for the County of Flathead, The Honorable Michael H. Keedy, Judge presiding.

COUNSEL OF RECORD:

For Appellant:
E. Eugene Atherton,
Kalispell, Montana

For Respondents:
Jonathan B. Smith,
Flathead County Attorney,
Kalispell, Montana

For Amicus Montana Federation of Teachers:
Michael Dahlem
Helena, Montana

Submitted on Briefs: May 13, 1993

Decided: July 29, 1993

Filed: /s/ Edward Smith
EDWARD SMITH
Clerk

Mr. Justice Fred J. Weber delivered the Opinion of the Court.

This is an appeal from a grant of summary judgment to Flathead Valley Community College by the Eleventh Judicial District Court, Flathead County. We affirm.

We consider the following issue on appeal:

Did the District Court err in granting Flathead Valley Community College's motion for summary judgment?

This action involves a series of term contracts signed between part-time instructor, Frank Talley (Talley) and Flathead Valley Community College (FVCC).

The series of term contracts began in September of 1982 and continued throughout the winter term of 1989, constituting 24 terms at the college.

During the winter of 1989, FVCC canceled Talley's Religious Studies class and reinstated it after objections were raised by Talley. Subsequently, Talley's classes for spring term were listed but again canceled. Talley's classes were cut again during the summer and fall terms. Talley has not been rehired by the college.

Talley filed a complaint and demand for jury trial on October 10, 1989. Talley claimed that he has not been rehired because he has spoken out concerning policies at the college and in retaliation

for union activity. FVCC claims that he was not rehired because of inadequate enrollment. On November 3, 1989, Talley filed an application for Alternative Writ of Mandate. The District Court issued an alternative writ on November 15, 1989, requiring the college to either reinstate Talley to his teaching position or to show cause why it should not do so.

FVCC filed a motion to quash the writ and to dismiss the application on November 20, 1989. A hearing was held on December 21, 1989, and subsequently the court quashed the alternative writ and dismissed the application for writ of mandate. Talley again filed an application for writ of mandate which was also denied by the court

on August 9, 1991. At this time the court also denied FVCC's motion to dismiss.

The original complaint in this action contained nine counts. On February 19, 1992, Talley filed an amended complaint alleging a tenth count based upon Montana's educational tenure statute, Section 20-4-203, M.C.A. Talley claimed that the tenure statute applies to part-time instructors of community colleges.

FVCC filed a motion for summary judgment on April 3, 1992. On July 30, 1992, Talley filed a cross-motion for summary judgment concerning Counts Ten, Three, Four, and Six of his amended complaint. The court issued its Memorandum and Order September 21, 1992, granting FVCC's motion for summary

judgment as to all counts except for claims of free speech in Count Four and the attendant issues of a Section 1983 claim and attorney's fees from Count Six and Count Nine.

Upon motion of Talley, the District Court in its September 21 Order also certified an interlocutory appeal pursuant to Rule 54 (b), M.R.Civ.P.

Did the District Court err in granting Flathead Valley Community College's motion for summary judgment?

a. Statutory Tenure

Talley argues that according to Section 20-4-203, M.C.A., he has acquired tenure. According to Talley, changes in the law governing community colleges do not

preclude the tenure statute from applying to instructors at FVCC. Talley further argues that FVCC's definition of "teachers" is incorrect.

FVCC argues that the tenure statute is applicable to teachers in elementary and high school districts, but not to part-time instructors at a community college. FVCC contends that Montana has already defined "school teacher" as excluding community college instructors. Further, FVCC argues that the use of "teacher" in the tenure statute also requires that a person be certified to teach by the Department of Public Instruction and that such is not the case for instructors at FVCC.

The District Court determined that no

genuine issues of material fact were present and that FVCC was entitled to summary judgment as a matter of law. The court determined that the tenure statute did not include community college faculty. The court granted summary judgment to FVCC on the tenure question which was Count Ten of Talley's complaint.

Our standard of review for a grant of summary judgment is the same as that initially applied by the trial court under Rule 56, M.R.Civ.P. Wangen v. Kecske (Mont. 1993), 845 P.2d 721, 726, 50 St.Rep. 6, 9. Summary judgment is appropriate if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.

Rule 56(c), M.R.Civ.P.

The moving party has the initial burden to prove that there are no genuine issues of any fact deemed material. Wangen, 845 P.2d at 726. Once movant has met this burden, the non-moving party must present evidence that a material fact does exist. Wangen, 845 P.2d at 726. Here, Talley also moved for summary judgment on this same issue.

The District Court determined that no disputed facts existed and that FVCC, which had moved for summary judgment, was entitled to judgment as a matter of law. Talley argued to the District Court that he, not FVCC, was entitled to summary judgment as a matter of law. Thus, the

pivotal question is a matter of legal interpretation.

This is a case of first impression in Montana as this Court has not previously interpreted Section 20-4-203, M.C.A. That section provides:

> **20-4-203. Teacher tenure.** (1) Except as provided in 20-4-208, whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher is considered to be reelected from year to year thereafter as a tenure teacher at the same salary and in the

same or a comparable position of employment as that provided by the last executed contract with the teacher unless the trustees resolve by majority vote of their membership to terminate the services of the teacher in accordance with the provisions of 20-4-204.

(2) The tenure of a teacher with a district may not be impaired upon termination of services of the teacher if the following conditions exist:

(a) the tenure teacher is terminated because the financial condition of the district requires a reduction in the number of teachers employed; and

(b) continued employment rights are provided for in a collectively bargained contract for the district. (Emphasis added).

The legislature has defined "teacher" in Chapter 20 as:

(18) "Teacher" means any person, except a district superintendent, who holds a valid Montana teacher certificate that has been issued by the superintendent of public instruction under the provisions of this title and the policies adopted by the board of public education and who is employed by the district as a member of its instructional, supervisory, or

administrative staff. This definition of a teacher shall also include any person for whom an emergency authorization of employment of such person has been issued under the provisions of 20-4-111. (Emphasis added).

Section 20-1-101, M.C.A. We consider whether Talley as an instructor at a community college is a "teacher" to whom the tenure statute applies.

Talley contends that Section 20-4-203, M.C.A., must include community college instructors because it always has and the legislature has not repealed it since it was originally codified as Section 75-6103, R.C.M., in 1971. We declined to read "community colleges" into Chapter four of

Title 20. Talley's assertion that we have previously defined "school teacher" as including those who teach in the State's system of higher eduction, citing Teamsters v. Cascade County School District No. 1 (1973), 162 Mont. 277, 511 P.2d 339, is incorrect. The Teamsters case defined who was included in the term "employees of the State." The action was one by the non-teaching employees of the State to obtain vacation time pursuant to Section 59-1001, R.C.M. (1947). Teamsters is not authority for the definition of teacher as it applies to community colleges.

The current law includes Section 20-4-203, M.C.A., and uses the word "teacher." The current definition section of Chapter

20 which defines teacher, states that a teacher is a person required to have a "teacher certificate that has been issued by the superintendent of public instruction." Section 20-1-101(18), M.C.A.

While it is true the community colleges of this State were once under the authority of OPI and were referred to as a School District, community colleges have been referred to as Community College Districts since 1979. In these Community College Districts, teaching faculty are not required to have teaching certificates issued by the OPI, although other requirements exist for employment as an instructor.

The 1979 Legislature attempted to clarify

the statutes governing community colleges by combining the statutory guidelines concerning the community colleges into one chapter of Title 20--Chapter 15:

> **Precedence of community college chapter.** Unless specifically identified in any other sections of the school laws prescribed in this title, community college districts are governed by the provisions of this chapter. Should there be a conflict between other requirements of this title and the provisions of this chapter regulating community college districts, the provisions of this chapter shall govern. (Emphasis added).

Section 20-15-402, M.C.A.

This language clearly indicates that

unless a statute in Title 20, other than in Chapter 15, specifically notes that it applies to community colleges, it does not apply to community colleges. The tenure statute is in Chapter 4 of Title 20. FVCC argues that the tenure statute does not specifically mention community colleges; therefore, it does not apply to them. We agree. Our job as a reviewing court is to interpret the laws before us -- not to add to those laws. Section 1-2-101, M.C.A.

The clear meaning of Section 20-4-203, M.C.A., is that it applies to all teachers who have been certified to teach by the Superintendent of Public Education and who teach in school districts under the authority of the OPI. Instructors at a

community college are not required to have certificates from the Superintendent and do not teach in school districts under the authority of the OPI. Community college instructors are not teachers as that term is defined in Chapter 4 of Title 20.

Because community colleges are not now governed by OPI as they once were, the Teamster case is no longer precedent for circumstances which involve community college instructors. To that extent, Teamsters is overruled. We have had occasion to consider the question of the relationship between community colleges and the word "teacher" found in Section 20-1-101 (20), M.C.A. (now Section 20-1-101(18), M.C.A.).

In Rippey v. Flathead Valley Com. College (1984), 210 Mont. 396, 682 P.2d 1363, we held that the ordinary meaning of the word "teacher" does not encompass higher education faculty, "including a community college faculty member." Rippey, 210 Mont. at 400, 682 P.2d at 1365. While the Rippey case dealt with sick leave compensation for faculty members at FVCC, the holding specifically interpreted the word "teacher" as it is used in the current Title 20 definition.

Both Rippey and the plain wording of Section 20-4-101(18), M.C.A., preclude any instructor at a community college in Montana from relying on the tenure provisions in Section 20-4-203, M.C.A.

Trustees of the community colleges have been given power by the Legislature to establish the conditions of employment of their staff and instructors pursuant to Section 20-15-225(1)(h), M.C.A. If FVCC chooses to have tenured faculty, it may establish the conditions under which that tenure is applied. Chapter 15 also contains the limitations of power with which the Legislature embued trustees:

> **Trustees to adhere to certain other laws.** Unless the context clearly indicates otherwise, the trustees of a community college district shall adhereto: . . . .

Section 20-15-404, M.C.A.

What follows is a long list of other

sections in Title 20 with which trustees of a community college must also comply. Section 20-4-203, M.C.A., is not one of them.

We conclude that Section 20-4-203, M.C.A., does not control tenure for instructors at any community college in Montana. Community colleges are unique centers for learning; they are neither high schools, nor are they part of the University System. Rippey, 210 Mont. at 397-98, 682 P.2d at 1364. Similarly, instructors teaching at these centers are also unique. Montana law specifically designates that community college districts are under the control of the Board of Regents and that community college trustees

have the power to set conditions of employment for their faculties.

We hold that the District Court did not err in granting summary judgment as to Count Ten of Talley's amended complaint.

b. Employment Arrangements, Past Practices and Property Interests.

Talley argues here that he is entitled to a "reasonable expectation of the opportunity for continuing employment." Such an expectation, argues Talley, is differentiated from his tenure argument. FVCC argues that Talley can have no such expectation because of the clear wording of his term-by-term contracts.

FVCC contended, and Talley did not deny, that every term contract signed by Talley contained the following phrase:

> It is understood and agreed that acceptance of this contract confers no right on the part-time faculty member to tenure, credit toward tenure, or any other permanent faculty status. (Emphasis added).

The wording of this phrase clearly indicates that any expectation of permanent status cannot be rooted in the term-by-term contracts which Talley has signed.

First, Talley argues that in his 1982 contract the aforementioned paragraph contained another sentence, part of which reads: "but may be renewed upon the same terms by mutual agreement, made in writing between the parties." (Emphasis added). Talley argues that because this phrase was

in his earlier contracts, that it must be read into all subsequent contracts which did not contain the wording.

Courts may not disregard the express language of contracts. New Hampshire Ins. Group v. Strecker (1990), 244 Mont. 478, 798 P.2d 130. The express wording of the contract signed by Talley indicates that the term contract cannot be the foundation for any kind of expectation of permanent employment. While he has used the phrase "opportunity for continuing employment" such a phrase is not legal and is an exercise in semantics. The essence of Talley's argument is that he was entitled to continuing employment at FVCC.

We considered a similar argument in

Farris v. Hutchinson (1992), 254 Mont. 334, 838 P.2d 374. Farris was employed under a series of term contracts prepared by the Montana University System. The last contract was effective between July , 1990, and June 30, 1991. Pursuant to a notice provision in her last contract, Farris received notice in February of 1991 that her contract would not be renewed. No reason for non-renewal was given.

Farris argued that she could show objective manifestations of job security beyond the term contract and thus, a genuine issue of material fact existed and summary judgment should not be granted. Farris, 254 Mont. at 337, 838 P.2d at 376. That is exactly the argument that Talley

makes here. He argues that he was given oral manifestations of continued employment despite the wording of his contract.

In Farris we pointed out that an agreement made in writing cannot be altered except by another writing or by an executed oral agreement. In response to the same argument as that made here by Talley, we further stated in Farris that no obligation can be implied which would result in the obliteration of a right expressly given under a written contract. Farris, 254 Mont. at 339, 838 P.2d at 377. Talley's contract is clear in regard to the very nature of his employment. No obligation can be inferred which would indicate an alteration of that agreement.

Talley further argues that he had a property right in his position as a part-time instructor at the college. Such a property interest, contends Talley, requires that he be given notice and a hearing before termination. FVCC argues that Talley did not have a property interest in his employment.

We have recognized that a property interest in one's position must be created by existing rules and regulations, state laws, or understandings between employee and employer. Medicine Horse v. Big Horn Co. School District (1991), 251 Mont. 65, 70, 823 P.2d 230, 233. In Medicine Horse, an employee argued he had a property interest in his employment despite the lack

of any such indication in his employment contract. We refused to read a property right into Medicine Horse's contract.

Unlike Medicine Horse's contract, Talley's contract specifically precludes any property right. In the face of such plain wording, Talley's subjective belief that he had a property interest in his job simply does not create such an interest. A subjective expectancy can create no constitutionally protected interest. Medicine Horse, 251 Mont. at 71, 823 P.2d at 233; citing Perry v. Sindermann (1972), 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570.

It is the Sindermann case which Talley cites for the argument that he has a

property right in his position at FVCC. He does not explain that statement, nor do we find anything in Sindermann Which confirms his analysis of the case. Sindermann merely determines that a property right in employment may be created by past practices or "mutually explicit understandings" of employer and employee. Sindermann, 408 U.S. at 601, 92 S.Ct at 2699, 33 L.Ed.2d at 580.

The manifestations that Talley indicates existed are not "objective" but are totally subjective. The clear wording in his contract precludes any objective expectation of continuing employment.

We conclude that the contract between FVCC and Talley is clear and unambiguous

on its face and creates no expectations of continuing employment with the college. FVCC met its burden by presenting the clear, unambiguous language of the contracts signed by Talley. Talley has not successfully rebutted this evidence nor shown that he is entitled to judgment as a matter of law. We hold the District Court did not err in granting summary judgment to FVCC on County One of Talley's Amended Complaint.

c. The Implied Covenant of Good Faith and Fair Dealing.

Talley argues that the various defendants here acted in violation of the covenant of good faith and fair dealing. FVCC argues that the contract between it and Talley was not breached and, therefore, the college

did not violate the covenant.

Talley did not file a cross-motion for summary judgment on this issue. Therefore, FVCC had the burden to prove that no material issue existed and it was entitled to judgment as a matter of law. It met that burden. Talley did not successfully rebut it.

Talley argued that under Montana law, the covenant of good faith and fair dealing is implied into every contract. Mann Farms, Inc. v. Traders State Bank of Poplar, Montana (1990), 245 Mont. 234, 801 P.2d 73. This is true. Thus, Talley argues that the college breached the covenant by not hiring him back.

Talley has overlooked a significant

factor: the nature and extent of the obligation of good faith and fair dealing is measured by justifiable expectations of parties. Cook v. Principal Mut. Life Ins. Co. (D.Mont. 1990), 784 F.Supp. 1513. The existence of the "no-tenure" phrase from Talley's contracts is an undisputed material fact. Despite such agreement, Talley argues he had a reasonable expectation of continuing employment. Given the plain wording of his contracts, such an expectation is not reasonable, nor is it justifiable.

Talley presents no argument which indicates a justifiable expectation in continued employment. We hold that the District Court did not err in granting

summary judgment to FVCC on Count Two of Talley's Amended Complaint.

d. Tortious Interference with a Contract Right and Constitutional Claims.

These arguments comprise Counts Three and Four of Talley's Amended Complaint. Talley filed a cross-motion for summary judgment on these two Counts. Talley argues that FVCC violated his constitutional rights under the United States and Montana Constitutions:

> No person shall be deprived of life, liberty or property without due process of law.

Art. II, Sec. 17, Mont.Const. Talley also argues equal protection, denial of due process, two issues on free speech and one

for slander, privileges and immunities under the First, Fifth and Fourteenth Amendments and a 42 USC Section 1983 claim. FVCC argues that there was no tortious interference with Talley's expectancy in continuation of his employment because of the clear wording in his contract. FVCC also contends that Section 1983 claims are not substantive claims but are based upon a deprivation of a constitutional right and Talley's rights have not been violated under the Montana or the United States Constitution.

The District Court granted FVCC's motion for summary judgment as to all issues except the free speech claims. Because most of these claims are based upon

Talley's property interest argument, we direct the reader to previous portions of this opinion and restate our prior determination: Under the facts of this case, Talley has no property interest in his position because his contract clearly prohibits it. Therefore, due process under the Montana or United States Constitution is not at issue. Further, all contracts with FVCC were successfully completed; thus, tortious interference with a contract is not an appropriate claim. Nor does the record contain evidence that others similarly situated were treated any differently than Talley in his position as part-time instructor, precluding an equal protection argument. The Privileges and

Immunity clause of the Fourth Amendment prevents discrimination by states against non-residents. The Privileges and Immunity clause of the Fourteenth Amendment protects attributes of United States citizenship and is rarely applicable. There is no privileges and immunities clause in the Fifth Amendment. Therefore, any privileges and immunities argument is also inappropriate.

However, the District Court did determine that Talley had a right to free speech which was protected by due process. The court did not determine whether this right had been violated. The claim evolved from a letter sent to Talley from FVCC during the course of legal proceedings. FVCC

there informed Talley that he would be considered for rehire in future terms only if he disavowed that he had expectations of continued employment.

The District Court denied both FVCC's and Talley's motions for summary judgment on the free speech issue attendant to Count Four of the amended complaint concerning free speech. No summary judgment being issued, that claim is still alive. Further, the Section 1983 claim cannot be considered until Talley's free speech claims are determined because a Section 1983 claim is based upon the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 USC Section 1983; Dagel v. City

of Great Falls (1991), 250 Mont. 224, 819 P.2d 186.

We conclude that the only constitutional claim which has merit under the pleadings is the claim of denial of free speech according to the First Amendment to the United States Constitution and the attendant Section 1983 claim. (Count Nine alleges a claim of slander and presents a question of fact to be considered by a jury).

We hold that the District Court did not err in so determining.

e. Attorney's Fees.

The District Court determined that attorney's fees for the constitutional violations associated with 42 USC Section

1983 could not be determined until after litigation of the free speech issue. If Talley prevails on his free speech claims, the District Court determined that he would be entitled to attorney's fees. Consideration of attorney's fees is, therefore, premature at this time.

f. Injunctive Relief.

Talley argues that he is entitled to injunctive relief and rehire because he was not rehired because of his exercise of free speech. FVCC contends that there are no grounds on which injunctive relief could be granted to Talley.

The District Court determined that because Talley did not have a property interest in his position as part-time

instructor, there were no grounds for injunctive relief.

An injunction is an equitable remedy fashioned according to the circumstances of a particular case. Montana Tavern Ass'n v. State By and Through Dept. of Revenue (1986), 224 Mont. 258, 729 P.2d 1310; Section 27-19-101, M.C.A., et seq. The issuance or refusal of injunction is addressed to the discretion of the trial court. Butler v. Germann (1991), 251 Mont. 07, 822 P.2d 1067. Because Talley did not have a property interest or a right to tenure under Montana's laws, the court did not abuse its discretion in denying a grant of injunction.

We hold that the District Court did not

err in granting summary judgment to FVCC on Count Eight of Talley's amended complaint.

Affirmed

/s/ Fred J. Weber
Justice

We concur:

/s/ J.A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ William E. Hunt, Sr.

/s/ Karla M. Gray

/s/ Russell McDonough
Justices

Justice Terry N. Trieweiler did not participate.

APPENDIX B

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FLATHEAD

Cause No. DV-93-526(B)

FRANK TALLEY,

Plaintiff,

v.

FLATHEAD VALLEY COMMUNITY COLLEGE, a Community College organized by the voters of Flathead County, Montana, on April 1, 1967, according to the Community College Law of the 1965 Montana Legislative Assembly; HOWARD L. FRYETT, Individually and as President of Flathead Valley Community College; DENNIS P. ADAMS, Individually and as Dean of Educational Services of Flathead Valley Community College; LOWELL JAEGER, Individually and as the Chairman of the Division of Humanities of Flathead Valley Community College; and DOES 1 through 5, inclusive,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on Cross Motions for Summary Judgment. Defendants move for summary judgment on all counts of Plaintiff's Complaint. Plaintiff seeks summary judgment on Count Ten, regarding statutory tenure, and Counts Three and Four, which allege violations of liberty and property rights and due process under the Montana and U.S. Constitutions. Plaintiff concedes that summary judgment is appropriate as to Counts Five and Seven.

Plaintiff seeks monetary and injunctive relief as a result of decisions of Flathead County (sic) Community College (FVCCC)

(sic) and certain of its administrators not to hire him to teach courses on a part-time basis beginning with the spring quarter of 1989 and to date. He also seeks monetary damages against Lowell Jaeger, alleging that Jaeger made slanderous statements about him.

Count One of Plaintiff's Complaint asserts that the actions of Defendants in not hiring him were in violation of his employment arrangements, express and implied policies, and past practices of the college. Defendants seek summary judgment on this count on the basis that there is no policy or regulation granting continuing employment to part-time instructors; and, in fact, the contract by which Plaintiff

BEST AVAILABLE COPY

was hired on a quarterly basis provided that "acceptance of this agreement confers no right to tenure, credit toward tenure, or any permanent faculty status. This agreement shall be for no more than one academic quarter/semester." On the other hand, Plaintiff argues that the facts support his claim that he had a "reasonable expectation for the opportunity of continued employment." Plaintiff relies upon Perry v. Sindermann (1972), 408 U.S. 593, as authority for his position that a non-tenured teacher can develop a "reasonable expectation for the opportunity of continued employment."

In Sindermann, the teacher who was not rehired had no formal contractual or

tenured security in the continued employment; however, the Supreme Court determined that the teacher's allegations raised a genuine issue as to his continued employment at the college. In particular, the teacher relied upon a provision int eh college's official faculty guide which stated, "Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." Sindermann, 408 U.S. at 600. In contrast, Plaintiff has a clause in his

contract assuring him that he has no tenure or permanent faculty status. He cannot claim a reasonable expectation of continued employment, and does not present sufficient evidence to establish a genuine issue as to his interest in continued employment.

Count Two of Plaintiff's Complaint alleges a violation by Defendants of the Covenant of Good Faith and Fair Dealing. The recent case of Farris v. Hutchinson, 49 St. Rep. 717, dealt with a similar claim. The court denied Farris's claim for breach of the covenant by the defendant for not rehiring her, on the basis that her contract provided for non-renewal with adequate notice. The court held that no obligation can be implied which would

result in the obliteration of a right expressly given under a written contract. Farris, 49 St. Rep. at 719. The express clause in Plaintiff's contract that he would not acquire tenure and had no permanent faculty status precludes a claim for the breach of the Covenant of Good Faith and Fair Dealing for the college's failure to grant him continuing employment.

Count Three alleges that Plaintiff had a contractual expectancy of continued employment, and that Defendants tortiously interfered with his rights. As discussed above, the plain contractual language of Plaintiff's quarterly contracts precluded a reasonable expectation of continuing employment.

Count Four alleges that Defendants' actions violated the 1st, 5th, and 14th Amendments to the U.S. Constitution. Plaintiff's subjective expectancy of continued employment is not protected by procedural due process, because his expectancy does not rise to the level of a property right as discussed above. However, Plaintiff does have a right of free speech which is protected by procedural due process, and which he argues was violated by the college's decision not to hire him to teach any further courses unless he abandoned his belief that he had a reasonable expectation of continuing employment. Sindermann, supra.

Count Six seeks attorney's fees for the

constitutional violations of 42 USC 1983 and 1985, as provided in 42 USC 1988. Should Plaintiff prevail on his free-speech argument, he would be entitled to attorney's fees by the authority of 42 USC 1988.

Count Eight alleges that Plaintiff is entitled to injunctive relief to be reinstated to his position at the college. Even if he had a property interest in continuing employment, this would not entitle him to reinstatement. "In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued

employment absent "sufficient cause . . . Proof of such a property interest would not, of course, entitle him to reinstatement." Perry v. Sindermann, 408 US 593 at 602-3. Plaintiff has not even established a question of fact regarding a reasonable expectation of continuing employment; therefore, he is not entitled to reinstatement.

Count Nine alleges a claim of slander against Defendant Jaeger, who argues that the remarks made by him were not slanderous and were privileged because they were made during the course of an official proceeding authorized by law, Section 27-1-803, M.C.A. The statements were made during a student senate meeting. The FVCC Board of Trustees

sets policies which govern the college, and one of these policies allows there to be student government. This is not a meeting of a public authority as anticipated by Section 27-1-803, M.C.A. Jaeger also argues that the statements were not slanderous. He allegedly said that Plaintiff was attempting to mislead and dupe students for his own self interests. It is possible that such statements could tend to disqualify Plaintiff in his chosen occupation. Section 27-1-803(3), M.C.A. Questions of fact exist that must be submitted to a jury.

Count Ten concerns the issue of statutory tenure. Plaintiff alleges that he is entitled to a grant of tenure under Section

20-4-203, M.C.A. He argues that this section applies to those teaching in community colleges, and that FVCC, by retaining this services quarter after quarter, has granted him tenure. In 1979, the legislature clarified which sections of the Montana Code Annotated apply to community college districts. Section 20-4-203, M.C.A. is not included. The college does grant tenure to some full-time faculty based upon Section 20-15-225(1)(h), M.C.A., which gives the college the authority to "appoint and dismiss a president and faculty for the community college; appoint and dismiss any other necessary officers, agents, and employees; fix their compensations; and set the terms and

conditions of their employment," and Section 39-31-305, M.C.A., which gives the college the authority and imposing upon it the duty to bargain collectively with respect to wages, hours, fringe benefits, and other conditions of employment. Section 20-4-203, M.C.A. applies only to a "teacher ... in a position requiring teacher certification ..." The statutes concerning certification do not apply to community college faculty members, and Plaintiff is not required to hold a teaching certificate. In Rippey vs. Board of Trustees of Flathead Valley Community College, 210 Mont. 396, 400, 682 P.2d 1363 (1984), the Montana Supreme Court said: "We find that the plain and ordinary

meaning of "schoolteachers" does not encompass higher education faculty, including the community college faculty member." Section 20-4-203 M.C.A. does not apply to Plaintiff.

Based upon the foregoing, IT IS HEREBY ORDERED that:

1. Defendants' Motion for Summary Judgement is granted as to Counts One, Two, Three, Four with the exception of Plaintiff's free-speech claim; Five, Six except as it applies to Plaintiff's free-speech claim; Seven, Eight and Ten.

2. Defendants' Motion for Summary Judgment is denied as to Count Four regarding Plaintiff's free-speech claim and Six regarding Plaintiff's free-speech

claim, and Count Nine.

3. Plaintiff's Motion for Summary Judgment as to Counts Three, Four, and Ten is denied.

Let judgment be entered accordingly.

DATED this 21st day of September, 1992.

/s/ Michael H. Keedy

District Judge